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SUBJECT: THE PROCESS OF RATIFYING FTAs IN COSTA RICA

1. (SBU) Summary. The process to ratify free trade agreements such as the United States-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) in Costa Rica is not simple. It is not even clear whether the agreement must be passed by a simple or a two-thirds majority. The Assembly members (deputies) will have to vote at least twice on the agreement -- once before and once after the Constitutional Court reviews it for any potential conflicts with the Costa Rican constitution. The entire process will take at least 6 months and possibly much longer, and the process can begin only after President Pacheco sends the treaty to the Legislative Assembly. Post is hopeful that that will occur this calendar year, but the President has not made a decision yet. End Summary.

SIX FTAs DOWN AND ONE TO GO

2. (U) The GOCR, with the Ministry of Foreign Trade (COMEX) as the lead governmental organization, has negotiated and the Assembly has approved five FTAs already: Mexico in 1995, Canada in 2001, Chile and the Dominican Republic in 2002, and most recently CARICOM, a group of 12 Caribbean nations comprising Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. (Note: In 1973, prior to COMEX's existence, the GOCR ratified an FTA with Panama.) As an example of the process, COMEX started negotiations with CARICOM on October 22, 2002, and ended on March 14, 2003. After President Pacheco signed the agreement on March 9, 2004, the agreement was sent to the Assembly where it was referred to the International Relations and Foreign Trade Commission for study. After voting to send the agreement for a vote on the Assembly floor, the Assembly approved the FTA in its first debate on the issue on May 9, 2004.

3. (U) As required by law, the Constitutional Court reviews all international agreements, including FTAs, to check that all procedural requirements are met and that there are no potential conflicts with the Costa Rican constitution. After finding no significant issue with respect to the agreement with CARICOM, the FTA, by law, had to be voted on a second time. On August 9, 2005, 41 of the 48 members present in the Costa Rican Legislative Assembly voted final approval of the FTA with CARICOM. The second vote occurred approximately one year after the Assembly first started discussions on this issue. The agreement was signed by President Pacheco on August 23, 2005, and will be published in the official government gazette, after which the FTA will be considered officially ratified.

A POSSIBLE TIMETABLE FOR CAFTA-DR

4. (U) Currently Costa Rica remains the only signatory country of CAFTA-DR that has not already sent the agreement to its legislature. The Administration is waiting for "the appropriate time" to send it for ratification. Assembly President Gerardo Gonzalez from the President's Social Christian Unity Party (PUSC) is still pursuing the acceptability of a deputy submitting CAFTA-DR to the Assembly if the President will not. COMMENT: Most constitutional experts believe that only the President is permitted to submit an international agreement such as CAFTA-DR to the Assembly for ratification. END COMMENT.

5. (SBU) The Constitutional Court finds problems with many bills it reviews and in that likely case would send its comments on potential conflicts to the Assembly for correction. If there are significant issues, the agreement may be sent back to the International Relations and Foreign Trade Commission to study the Court's comments and to implement corrective changes, if possible. With respect to

CAFTA-DR, Assembly staff sources told Econoff that the President of the International Relations and Foreign Trade Commission Rolando Lacle (PUSC) has primed the process by discussing conduct of the review with Commission members. The first vote is expected in approximately three to four months, followed by an at least one-month review by the Constitutional Court. In a best-case scenario, a second vote would be held approximately four to five months after CAFTA-DR is introduced in the Assembly. (Note: In the case of the CARICOM FTA, which was not contentious, 16 months elapsed between the first vote in the Assembly and the agreement coming into force. Many Costa Ricans estimate that 6-8 months of debate may be needed for CAFTA-DR before the first vote.)

SIMPLE MAJORITY OR TWO-THIRDS TO PASS CAFTA-DR?

16. (SBU) There still exists a question as to whether a simple majority or two-thirds majority is required to pass CAFTA-DR. The prevailing opinion from many sources is that only a simple majority (half plus one) is necessary in each of the two Assembly votes to approve CAFTA-DR. However, there are some political experts who believe that a two-thirds majority will be necessary. Based on information provided by a former COMEX official and Legislative Assembly staff members, all previous FTAs were passed by more than a two-thirds vote, although the stated requirement was only a simple majority. During the most recent FTA vote, Assembly President Gerardo Gonzalez issued a ruling stating that the approval of the CARICOM FTA required only a simple majority.

17. (SBU) The Constitutional Court reviewed the case and did not take issue with his ruling. FTAs may vary in the breadth and detail of the texts. It appears that the issue regarding how many votes will be needed to pass CAFTA-DR remains unclear. A former COMEX official stated that the investment-related portions of CAFTA-DR may be an aspect that could lead one to believe that a two-thirds majority is required. COMMENT: Based on information available to Post, there may be enough support for CAFTA-DR in the current Assembly to pass the agreement even if a two-thirds majority is required, especially if most of the PUSC, National Liberation Party (PLN), and Libertarian Movement Party (ML) deputies vote in favor of CAFTA-DR, as they currently say they will. END COMMENT.

18. (SBU) Legislative Assembly staff members insist that only a simple majority is required for CAFTA-DR approval and cite the most recent FTA with CARICOM as an example. Based on information provided by these sources, a review of a minimum of three to four months until the first vote is expected. The Constitutional Court review will take at least one month, followed by the second vote or, in the case of finding significant issues, perhaps another lengthy review process.

19. (SBU) Proponents of requiring a two-thirds majority to pass CAFTA-DR refer to a much-disputed 1993 Constitutional Court ruling involving the World Bank's International Center for Settlement of Investment Disputes (ICSID). The Constitutional Court stated that due to the ceding of control of legal remedies to a supra-national body, a two-thirds majority was required. However, according to a former COMEX official, this ruling appears to be based on an obscure 1960 change to the constitution that was passed to discourage closer ties with other Central American countries. The Constitutional Court's decision in that case seems not to have been based on precedent and has not been repeated during the review of numerous other international agreements, such as joining the World Trade Organization, in which Costa Rica ceded far broader jurisdiction on commercial disputes than is contemplated under CAFTA-DR.

COMMENT

10. (SBU) The Legislative Assembly's history regarding the length of time it takes to approve an FTA does not bode well for a rapid approval of CAFTA-DR. The Assembly took approximately 18 months to approve the most recent FTA with CARICOM. Post believes that the process to approve CAFTA-DR, once it is in the Assembly's hands, will take at least six months. Complicating the CAFTA-DR approval process are the Presidential and Legislative elections that will be held in February 2006. The President and entire Assembly will be replaced in May 2006 as consecutive terms are not permitted under Costa Rica's constitution.
FRISBIE